

The Honorable Benjamin H. Settle

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

JOHN DOE #1, an individual, JOHN  
DOE #2, an individual, and PROTECT  
MARRIAGE WASHINGTON,

Plaintiffs,

v.

SAM REED, in his official capacity as  
Secretary of State of Washington,  
BRENDA GALARZA, in her official  
capacity as Public Records Officer for the  
Secretary of State of Washington,

Defendants.

NO. C09-5456BHS

DEFENDANTS' RESPONSE TO  
ORDER TO SHOW CAUSE RE  
STAYING PROCEEDINGS  
PENDING NINTH CIRCUIT  
APPEAL

Pursuant to this Court's Order dated September 16, 2009, Defendants submit this memorandum regarding whether or not a stay should be granted in this proceeding pending its appeal to the Ninth Circuit. The Defendants request that further proceedings in this Court be

1 stayed pending completion of the two appeals now pending in the Court of Appeals for the  
2 Ninth Circuit.<sup>1</sup>

### 3 INTRODUCTION

4 This is an action brought by two "John Doe" individuals and by Protect Marriage  
5 Washington, an organization, seeking to bar the Defendant Secretary of State from providing  
6 public access to the referendum petitions filed with the Defendant. At this time, the only  
7 referendum petitions in the possession of the Defendant that are the subject of a public records  
8 request relate to Referendum 71, which has qualified to appear on Washington's November  
9 2009 election ballot. The Plaintiffs seek a declaration that Washington's public records act is  
10 unconstitutional as applied to referendum petitions, and seek a permanent injunction against its  
11 enforcement.  
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14 On September 10, 2009, this Court granted a preliminary injunction barring the  
15 Defendants from publicly releasing any referendum petitions. On September 11, the  
16 Defendants appealed the grant of the preliminary injunction to the Ninth Circuit. On  
17 September 15, the Intervenor Washington Coalition for Open Government also appealed. By  
18 order dated September 22, 2009 (copy attached as Exhibit A) the Court of Appeals  
19 consolidated the two appeals, adopted an expedited briefing schedule, and scheduled oral  
20 argument for October 14, 2009.  
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26 <sup>1</sup> The Appeal of Defendants Reed and Galarza is Court of Appeals No. 09-35818. The Appeal of Intervenor Washington Coalition for Open Government is Court of Appeals No. 09-35826.

1 On September 16, this Court entered an Order requesting the parties to file briefing as  
2 to whether further proceedings in this Court should be stayed pending the appeals.

3  
4 **POINTS AND AUTHORITIES**

5 A district court has discretionary power to stay proceedings in its own court. *Lockyer*  
6 *v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005), citing *Landis v. North American Co.*,  
7 299 U. S. 248, 254, 57 S. Ct. 163, 81 L. Ed. 153 (1936). The Court of Appeals has set the  
8 following standards for such a stay:

9 Where it is proposed that a pending proceeding be stayed, the competing interests  
10 which will be affected by the granting or refusal to grant a stay must be weighed.  
11 Among those competing interests are the possible damage which may result from the  
12 granting of a stay, the hardship or inequity which a party may suffer in being required  
to go forward, and the orderly course of justice measured in terms of the simplifying or  
complicating of issues, proof, and questions of law which could be expected to result  
from a stay.

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14 *Lockyer*, 398 F.3d at 1110, quoting *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th Cir. 1962).

15 The Parties will suffer no damage from the granting of a stay. As noted below, it best  
16 serves the “orderly course of justice” to stay proceedings in this court while the appeals are  
17 pending, and no party will be prejudiced by a stay. The Court has entered a preliminary  
18 injunction, based in large part upon a determination that the Plaintiffs in this case are likely to  
19 prevail. This determination is the primary subject of the appeals, in which the Defendants and  
20 the Intervenor contend that this Court has misapplied the case law concerning the First  
21 Amendment interests asserted by the Plaintiffs, leading in turn to a misconstruction of the  
22 State’s burden in defending its public records act against constitutional attack and  
23 misapplication of preliminary injunction standards.  
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1           Whether the Court of Appeals affirms or reverses this Court's ruling, if this Court stays  
2 further proceedings, this Court can eventually proceed based on clearer information about the  
3 state of the law at issue. By contrast, if this Court proceeds to decide the merits of the case  
4 while an appeal is going forward, there is a definite chance that the results of the appeal will  
5 require this Court to revisit its judgment in light of any issues decided at the appellate level.  
6 Such a situation would waste judicial resources and would not serve the best interests of any  
7 party.  
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9           The Plaintiffs would not be prejudiced by a stay. Their long-term goal is evidently to  
10 establish the extent to which First Amendment rights are impaired by the state's public  
11 records law, and an early appellate ruling on those issues serves that goal. If this case were to  
12 proceed with appeals still pending, any "victory" achieved by either side in this Court would  
13 be tentative and contingent, and might only require further proceedings on remand.  
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15           Good order and judicial economy call for a stay. The Court of Appeals has set an  
16 expedited schedule, so much expedited that the appeals might well be decided before any  
17 further proceedings in this Court would be scheduled. Efficiency and good order call for  
18 waiting for clarification of the major legal issues before moving toward judgment on the  
19 merits. If the appeals are resolved first, it will be clearer (1) what the law is and (2) what the  
20 next step in this case should be in light of the appellate rulings.  
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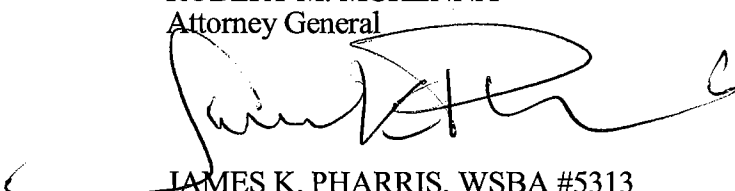
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1 **CONCLUSION**

2 For the reasons stated above, the court should stay all further proceedings pending  
3 completion of the pending appeals.

4  
5 RESPECTFULLY SUBMITTED this 26th day of September, 2009.

6 ROBERT M. MCKENNA  
7 Attorney General

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 26, 2009, I electronically filed DEFENDANTS' RESPONSE TO ORDER TO SHOW CAUSE RE STAYING PROCEEDINGS PENDING NINTH CIRCUIT APPEAL in the above-referenced case with the Clerk of the Court using the CM/ECF System, which system will send notification of such filing to counsel of record.

DATED this 26th day of September, 2009.

/s/ James K. Pharris  
James K. Pharris

# **EXHIBIT A**

FILED

UNITED STATES COURT OF APPEALS

SEP 22 2009

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK  
U.S. COURT OF APPEALS

JOHN DOE #1, an individual; et al.,

Plaintiffs - Appellees,

v.

SAM REED, in his official capacity as  
Secretary of State of Washington; et al.,

Defendants - Appellants,

and

WASHINGTON COALITION FOR  
OPEN GOVERNMENT,

Defendant-Intervenor -  
Appellant.

Nos. 09-35818, 09-35826

D.C. No. 3:09-cv-05456-BHS  
Western District of Washington,  
Tacoma

ORDER

The court sua sponte consolidates these preliminary injunction appeals: No. 09-35818 and No. 09-35826. Appellants' request to expedite the briefing schedule is granted in part. Appellants have filed their opening brief. Intervenor's brief is due September 23, 2009. Appellees' answering brief is due September 25, 2009. Appellants' optional reply brief is due September 28, 2009. Intervenor's optional reply brief is due September 30, 2009.

AW/MOATT



The provisions of Ninth Circuit Rule 31-2.2(a) shall not apply to these consolidated appeals.

The court will hear oral argument on Wednesday, October 14, 2009, at 11:00 a.m. at The Richard H. Chambers Courthouse in Pasadena, California. Each side will be given fifteen minutes for oral argument. Appellants shall share the balance of their fifteen minutes with intervenor.

FOR THE COURT:

Molly Dwyer  
Clerk of Court

By: Amber West  
Motions Attorney/Deputy Clerk  
9th Cir. R. 27-7  
General Orders/Appendix A